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Supreme Court of the United States

MONICA CASTRO, FOR HERSELF AND AS NEXT FRIEND OF R.M.G.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR AMICI CURIAE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND LEGAL SERVICES FOR CHILDREN IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend individual rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on

immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project has participated as amicus curiae in several significant immigration-related cases before this Court.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild (NLG) to combat misconduct by police officers, prison guards and other law enforcement officers. The project presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, which present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

Legal Services for Children (LSC), founded in 1975, is one of the first non-profit law firms in the country dedicated to advancing the rights of youth. LSC provides direct legal and social services to children and engages in systemic reform litigation in the San Francisco Bay Area, representing clients in cases that include immigration, legal guardianship, dependency, school discipline. LSC has published several reports on the legal rights of children including *The Case for Reform: San Francisco's Immigrant Youth Policy, Juvenile Probation's Policy of Referring Youth to I.C.E. Without Due Process.*

LSC represents over 550 clients annually and provides consultation, legal advice and referrals to over 1,500 youth and concerned adults and has participated as amicus curiae in several significant cases involving the rights of children.

Amici have a substantial interest in the outcome of this case. [1] The Federal Tort Claims Act ("FTCA" or the "Act") provides compensation for victims of government negligence and abuse. All too often, those cases arise in the immigration and law enforcement contexts, like the case at issue here. They arise when American citizens are unlawfully detained or deported. They arise when people in immigration detention are mistreated or denied proper medical care. And they arise when immigration officials engage in unlawful home raids.

A robust and uniform Federal Tort Claims Act is essential both to compensating victims and to preventing future abuse. Policies at both the national and local levels are consistently affected by the risk of tort liability. The decision below restricts liability in a way that actually discourages local offices in the Fifth Circuit from setting rules and guidelines to ensure that Border Patrol agents and law enforcement officers correctly and fairly execute their tasks. If it is allowed to stand, many more than Monica Castro will have no remedy and no protection when

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date, and have consented to its filing.

they are subject to malfeasance by Border Patrol and other government agents. The Court should grant certiorari now and reverse the Fifth Circuit so that individuals, companies, and organizations can enjoy uniform protection everywhere in the country.

INTRODUCTION

The Fifth Circuit has confirmed its alignment with the Seventh Circuit in erroneously expanding the Federal Tort Claims Act's discretionary function exception to include any act that does not violate a specific statutory, regulatory, or policy mandate, and the time has come to end the nearly four-decade-old conflict in the circuits. The Seventh Circuit's ruling—without any analysis—that Constitutional violations are "discretionary" under the Act had sat alone while circuit after circuit disagreed. But now, the Fifth Circuit, which houses a large share of the United States' immigration detainees, has decided, en banc, to confirm its previously-unpublished agreement with the Seventh Circuit and hold that violations of state tort law are not compensable under the Act when they arise out of unconstitutional or *ultra vires* behavior by government agents.

As a result, 57 million people, and all of the businesses and other organizations residing and doing business within the Fifth and Seventh Circuits, have a vastly different Federal Tort Claims Act from the one enjoyed by most of the country. The discretionary function exception is now so all-encompassing in those circuits that the only conduct that escapes its reach is conduct that violates an express statutory, regulatory, or policy mandate. And the impact in the immigration realm will be significant.

Hundreds of thousands of people are apprehended each year in the United States for immigration enforcement reasons. Texas, which sits in the Fifth Circuit, has the United States' longest border with Mexico, and it is the source of numerous immigration cases. Most of these people proceed without counsel and rely on government agencies to perform their duties within the bounds of the Constitution and their statutory mandates. Beyond the immigration realm, the Act touches a panoply of government functions that affect individuals, businesses, and other organizations.

Thus, more than money is at stake here. The Federal Tort Claims Act provides an important deterrent to negligent and abusive behavior by government officials. When properly construed, it encourages agencies to adopt policies for the fair and ethical treatment of the people they encounter. Conversely, the Fifth and Seventh Circuits' interpretation of the Act creates an incentive for agencies to *avoid* providing specific mandates because those mandates are the only way to create exposure under the Act. No more litigation in the courts below will aid this Court's analysis. All but three circuits have ruled on the discretionary function exception's scope with respect to unconstitutional conduct, *ultra vires* conduct, or the law enforcement proviso. On an issue of such critical importance, those who are disadvantaged by the fact that they were injured in the wrong circuit should not have to wait any longer.

REASONS FOR GRANTING THE WRIT

I. THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED WITHOUT DELAY.

1. This case involves two circuit splits that warrant resolution without delay. Disparate interpretations of the discretionary function exception's outer limits are a recurring problem that provide a large minority of Americans with a version of the Act that can be circumvented with little effort. Recently, the Fifth Circuit confirmed its agreement with the Seventh Circuit in holding that any conduct not mandated by statute, regulation, or policy—including conduct prohibited by the Constitution—is "discretionary" and exempt from liability under the Act. This holding directly conflicts with those of the First, Second, Third, Fourth, Eighth, Ninth, and D.C. Circuits, which have held that the exception does not cover conduct that is *ultra vires* or unconstitutional. Pet. 16; Pet. App. 32a-33a (panel opinion citing cases). Additionally, the Fifth Circuit exacerbated the split on the applicability of the discretionary function exception to claims that fall within the law enforcement proviso. Pet. 33.

This divide is real and it has dangerous consequences for tens of millions of Americans. Castro's case reflects the troubling reality that the circuits apply significantly different legal standards under the same statute, which has unambiguous language. Presently, there are about 32 million people living in the Fifth Circuit, and about 25 million people in the Seventh Circuit. U.S. Census

Bureau, *2009 Population Estimates*.[2] For those 57 million people—about 18 percent of the total U.S. population—the Act's force has been weakened by the Fifth and Seventh Circuits' disregard for known restraints on governmental power. And that number does not account for the panoply of businesses and other entities who also must accept injury from the government by *ultra vires* acts or constitutional violations without any hope of compensation under otherwise-applicable state tort law, through the Act. *See, e.g.*, *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512 (8th Cir. 2001) (holding that the United States could be sued under the FTCA for negligence as a loan guarantor to a business).

The Act's interpretation is further splintered under the law enforcement proviso, which waives sovereign immunity for certain intentional torts otherwise excepted from the Act's coverage when based upon acts or omissions of law enforcement or investigatory officials. 28 U.S.C. § 2680(h). About 33 million people—Eleventh Circuit residents—benefit from the law enforcement proviso even when the discretionary function exception, which provides invaluable protection from law enforcement officers' misconduct, might otherwise apply. *Nguyen* v. *United States*, 556 F.3d 1244, 1256 (11th Cir. 2009); U.S. Census Bureau, *2009 Population Estimates*. Four years ago, the Court denied a petition for certiorari in *Welch* v. *United States*, 546 U.S. 1214 (2006), which similarly presented the question of whether a claim that is subject to the law enforcement proviso must also overcome the due care and discretionary function

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[2] http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2009_EST&-format=US-40S.

exceptions to the Act. *See* Petition for Certiorari, No. 05-529, 2005 WL 2777348 at *i. Since then, two additional circuits have weighed in, one on each side of the question, and the Fifth Circuit has reversed course. *See Reynolds* v. *United States*, 549 F.3d 1108, 1114 (7th Cir. 2008); *Ngyuen*, 556 F.3d at 1256-57; *compare Sutton* v. *United States*, 819 F.2d 1289, 1297 (5th Cir. 1987) with *Castro* v. *United States*, Pet. App. 1a.

Claims under the Act involve injuries inflicted by the government through a wide array of means. But its protection means little if redress is not equally available to all. In *Nguyen*, 556 F.3d at 1247-48, a doctor fled to America from Vietnam after the communist takeover and a one-year prison term. After years of medical practice and becoming an American citizen, the doctor was arrested for unlawful distribution of controlled substances. As a result, the doctor's practice suffered. *Id.* at 1248. He was temporarily banned from prescribing drugs, health insurance companies canceled their contracts with him permanently, and he lost patients. *Id.*

The doctor sued the United States under the Act because the arrest "was not based on any evidence of wrongdoing at all." *Id.* In response to the doctor's false imprisonment and malicious prosecution claims, the government invoked the discretionary function exception, but the court rejected its application. *Id.* at 1260. In its opinion, the Eleventh Circuit noted how this story "illustrates the value of living in a country where a citizen may pursue claims against the government," *id.* at 1246, as opposed to his previous country, from which "he had no remedy but to flee" after being wrongly jailed, *id.* at 1249.

Fortunately for the doctor, he fled to Florida, in the Eleventh Circuit, rather than Texas, in the Fifth. But Monica Castro was unfortunate enough to have been in the Fifth Circuit when her daughter was sent to Mexico. And as this case establishes, a party injured in the Fifth or Seventh Circuits cannot receive any relief against the United States under state tort law when federal law enforcement act beyond their scope of authority, violate constitutional rights, or even commit intentional torts clearly actionable under the Act.

In most of the country, Monica Castro would have a fair opportunity for relief, and Border Patrol might think twice about detaining a known U.S. citizen and making decisions about child custody to save $200. Pet. 6 n.4. The people who are injured in the conflicting circuits benefit from an FTCA that offers a deterrent against unauthorized, unconstitutional conduct by government officials by properly asserting jurisdiction under the Act and allowing the injured party to seek compensation under state tort law.

These issues have percolated in the circuit courts for nearly forty years, and only the Sixth, Tenth, and Federal Circuits have not yet ruled on them in some way. Thus, the topics are ripe for this Court's analysis and waiting for holdings in yet undecided circuits would only further fracture the decisional landscape. This case presents an opportunity for this Court to establish a uniform interpretation of the Act's discretionary function exception so that all will receive equal protection against unconstitutional and *ultra vires* government intrusion. Between the discretionary function exception and the law enforcement proviso, there are myriad regimes applying the same statutory language. After four

decades of litigation spanning almost every circuit, the time has come to resolve these issues and make the Act that touches so many lives uniform for all.

2. By dismissing Castro's case, the Fifth Circuit necessarily decided that a constitutional violation or an *ultra vires* action is discretionary under the Act. But both the Fifth and Seventh Circuit interpretations of the discretionary function exception are premised on a clear misreading of the Act and this Court's precedents. For that reason, summary reversal may be appropriate.

The Act provides a basic sovereign immunity waiver for tortious conduct, 28 U.S.C. § 1346(b)(1), with some express exceptions, 28 U.S.C. § 2680. The discretionary function exception plainly states that a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function" is barred. At the margins, there is room for interpretation regarding what constitutes a "discretionary function." But this case does not involve disputed facts existing near the margin. The Fifth Circuit *categorically* included unconstitutional and *ultra vires* acts within the discretionary function exception. Of course, it is axiomatic that there is "no 'discretion' to violate the Constitution." *Owen* v. *Independence*, 445 U.S. 622, 649 (1980). And *ultra vires* conduct is by definition impermissible and thus non-discretionary, *Hollar* v. *Virgin Islands*, 857 F.2d 163, 168 (3d Cir. 1988), so the government cannot qualify for the exception when its conduct is *ultra vires* either. Thus, the Fifth Circuit's decision to dismiss Castro's claims contravenes this Court's precedents and the Act's plain language.

The en banc panel adopted the district court's reasoning, which relied on an unpublished Fifth

Circuit decision as its primary support for the position that the discretionary function exception protects conduct that violates the Constitution. Pet. App. 3a, 67a (citing *Garza* v. *United States*, 161 Fed. Appx. 341, 343 (5th Cir. 2005)). The *Garza* panel purported to rely on *United States* v. *Gaubert*, 499 U.S. 315 (1991), to find that if no "statute, regulation, or policy mandates a specific course of action," then "the governmental action is considered discretionary." 161 Fed. Appx. at 343. But the court plainly misread *Gaubert*. Nothing in *Gaubert* supports the position that only acts mandated by statute, regulation, or policy are non-discretionary. But the Fifth Circuit has taken the "expressio unius" canon of *statutory* construction to absurd lengths by applying it to case law and assuming that the Court meant to exclude constitutional and *ultra vires* torts when it stated that the discretionary function exception does not apply when a "statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322; Pet. App. 42a (dissent from panel opinion stating that "[t]he omission of 'Constitution' from the Court's explicit list of sources that can create a 'mandate' that nullifies the discretionary function exception should be dispositive here"). That the exception does not apply when there is a specific statute, regulation, or policy does not mean that those are the *only* circumstances it does not cover.

This Court did not need to apply the exception to unconstitutional conduct in *Gaubert*. 499 U.S. at 318. The complaint only alleged that certain government actors had performed their duties negligently, violating certain regulations. *Id.* And the Court held that the regulations specifically provided

discretion to the federal officers, which triggered the discretionary function exception. *Id.* at 332. Because the Court did not rule on an activity that was allegedly unconstitutional or outside the government agency's powers, *Gaubert* is no authority for the proposition that unconstitutional and *ultra vires* conduct is "discretionary" under the Act. *See Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787 n.4 (1996) (stating that a case was not authority on a matter not presented or addressed).

Indeed, when discussing the discretionary function exception's boundaries in the abstract, the Court noted in *Gaubert* that the exception only applies to conduct involving choice or, "judgment as to which of a range of *permissible* courses is the wisest." 499 U.S. at 325 (emphasis added). This comports with Congress' intent that the discretionary function exception was "intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an *authorized activity*." H.R. Rep. No. 79-1287, at 5 (1945). (emphasis added). Lacking binding authority interpreting the Act, the Fifth Circuit should have applied this Court's settled precedents on what is "discretionary" or "permissible" in other contexts. Then, it would have been compelled to conclude that the government does not have discretion to violate the Constitution or act outside the scope of its authority.

For its part, the Seventh Circuit did not offer any analysis supporting its statement that the government's "exercise of discretion, albeit constitutionally repugnant," was exempt from compensation under the Act. *Kiiskila* v. *United States*, 466 F.2d 626, 627-28 (7th Cir. 1972). The

decision (1) includes just one sentence claiming that unconstitutional acts can be protected under the discretionary function exception, (2) notes that the government's authority was "constitutionally limited," and then (3) fails to reconcile the constitutional limitation with its ruling that the government's conduct was discretionary. *Id.* Weighing the Fifth and Seventh Circuits' cursory analyses against the well-reasoned opinions of the myriad other circuits to rule on these issues, Pet 15-20, it is clear that unconstitutional and *ultra vires* actions are not "discretionary" and are not excepted from liability under the Act.

II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

A. The Act Is An Invaluable Asset To Prevent Mistreatment Of Immigration Detainees And Compensate Victims.

The Act plays an important role in compensating victims of governmental negligence and abuse. It also provides an important deterrent to government misconduct and a valuable incentive for agencies to develop strong policies that promote accountability and professional treatment of citizens. By placing the Act's scope in the hands of the very agencies it purportedly holds accountable, the Fifth and Seventh Circuits have limited the Act's deterrent function.

This Court has recognized that the Act was designed to provide redress to individuals with meritorious claims against the federal government when those claims would otherwise be barred by sovereign immunity. *United States* v. *Muniz*, 374 U.S. 150, 154 (1963). And its deterrent value is

evident in Congress's addition of the law enforcement proviso.

In 1973, in light of abusive and unconstitutional no-knock home raids by federal law enforcement officials, Congress amended the Act to include the law enforcement proviso, which provides individuals with a remedy against the federal government for the intentional torts of its law enforcement officers. S. Rep. No. 93-588, at 2790 (1973). It did so shortly after this Court held in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), that the Constitution provides a cause of action for violations by federal officials. *Carlson* v. *Green*, 446 U.S. 14, 20 (1980). Congress intended that the Act and *Bivens* suits would provide "parallel, complementary causes of action" to aggrieved victims. *Id.* (*citing* S. Rep. No. 93-588, at 3 (1973)). Because some victims of torts committed by federal officials that also violate the Constitution may not have an available or adequate remedy under *Bivens*, the Act is at times the viable means of redress for them.[3] By carving out this additional exception to the federal government's

[3] The defense of qualified immunity, available to defendants in *Bivens* suits but not to the United States under the FTCA, often defeats plaintiffs' claims. *See, e.g.*, Peter H. Schuck, *Suing Government*, 98, 100 (Yale University Press 1983). Furthermore, the Court has refused to supply a *Bivens* remedy in several contexts. *See, e.g.*, *Bush* v. *Lucas*, 462 U.S. 367 (1983) (First Amendment claims by federal employees);*United States* v. *Stanley*, 483 U.S. 669 (1987) (injuries suffered by members of the military); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (due process actions for denial of Social Security benefits). And for some torts, *Bivens* claims are statutorily precluded even when they violate the Constitution. *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1851 (2010) (holding that the FTCA is the exclusive remedy for personal injury claims against a Public Health Service employee).

sovereign immunity, Congress sought to strengthen the Act's deterrent value.

The Act's purposes of providing deterrence and an adequate legal remedy for meritorious claims are thwarted when the United States is granted immunity from suit where law enforcement officials commit unconstitutional and otherwise unlawful acts. Such a broad interpretation of the discretionary function exception would have especially harmful consequences in the area of immigration enforcement, where hundreds of thousands of people are apprehended each year. *See* Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2009* (2010) ("*Enforcement Actions*").[4] This enforcement has come with concomitant constitutional violations relating to immigration enforcement activities. *See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 71 (Feb. 13, 2008) (statement of Rachel E. Rosenbloom, Human Rights Fellow and Supervising Att'y, Boston College Center for Human Rights and International Justice) ("Rosenbloom Statement").

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[4] http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf. The Department of Homeland Security, which includes U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) made 613,003 apprehensions in 2009, 91% of which were effectuated by CBP. *Enforcement Actions* at 3. ICE now operates the largest detention and supervised released system in the country. See Dora Schriro, *Immigration Detention Overview and Recommendations*, (2009) ("Schriro"), (www.ice.gov/doclib/091005_ice_ detention_report-final.pdf).

Immigration detainees are highly susceptible to government abuse. About 90% of immigration detainees and over half of all people in removal proceedings proceed without counsel.[5] U.S. Dept. of Justice, Executive Office for Immigration Review, *FY 2007 Statistical Yearbook* (2008).[6] Thus, the likelihood of constitutional error is enhanced, *see* Rosenbloom Statement at 75, and the need for a proper remedy and a proper deterrent is greater.

The problem of detention and deportation of U.S. Citizens is so widespread that citizens may even be detained and deported on a daily basis. *See Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 42 (Feb. 13, 2008) (statement of Kara Hartzler, Florence Immigrant & Refugee Rights Project) ("Hartzler Statement"). Some data suggest that about 1% of immigration detainees are U.S. citizens and that .5% of those who are eventually deported are citizens as well. Jacqueline Stevens, *U.S. Citizens Detained and Deported: 2010 Fact Sheet*, States Without Nations (Jul. 15, 2010) (data to be published in __Va. J. Soc. Policy & L. __, forthcoming January, 2011).[7] That 1% amounts to over 300 U.S. citizens in DHS custody on a given day,

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[5] Unlike criminal proceedings, immigration proceedings do not entitle respondents to the right of counsel at government expense. 8 U.S.C. § 1362; *see* Rosenbloom Statement at 71. And in some proceedings, there is no right to counsel at all. *Id.*

[6] http://www.justice.gov/eoir/statspub/fy07syb.pdf

[7] http://stateswithoutnations.blogspot.com/2010/07/us-citizens-detained-and-deported-2010.html.

according to the DHS average daily immigration detention population statistics. Schriro at 2. Indeed, in 2007, a study determined that in just 13 out of the more than 300 immigration detention facilities, 322 detained individuals had citizenship claims. Nina Siulc et al., *Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II*, Vera Institute of Justice, 38 n.45, 73, App. I (2008).[8] And unlawfully detained American citizens are sometimes locked away in immigration detention for years. See, e.g., *Flores-Torres* v. *Holder*, 680 F. Supp. 2d 1099, 1100 (N.D. Cal. 2009) (noting U.S. citizen detained for over three years in ICE custody); Hartzler Statement at 86 (noting that U.S. citizens detained sometimes for years before winning release).

The Act is a valuable means of redress for United States citizens who have been wrongfully deported and detained by immigration officials. United States citizens have a constitutional right against deportation by immigration authorities. *See Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). They also have a constitutional right to be free from detention by

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[8] http://www.vera.org/download?file=1778/LOP%2Bevalution_updated%2B5-20-08.pdf. A non-comprehensive study by the Associated Press of the problem of citizen deportation and detentions found that at least 55 United States citizens were deported or detained from 2001-2009. *See* Suzanne Gamboa, *AP Impact: Citizens Held as Illegal Immigrants*, The Monitor, Apr. 13, 2009, http://www.themonitor.com/articles/yet-25325-life-guzman.html. Others put the number of U.S. citizens detained by immigration authorities in the hundreds. Tyche Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, S.F. Chron., Jul. 27, 2009, (http://articles.sfgate.com/2009-07-27/news/17218849_1_judy-rabinovitz-immigration-laws-illegal-immigrant/2).

immigration officials. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). And the Act provides an effective remedy to those whose unconstitutional deportation or detention also violates state tort law. *See* Hendricks, *supra* (noting several settlements of FTCA and *Bivens* actions in cases brought by wrongfully deported and detained U.S. Citizens); *see also* Compl., Stip. Compromise Settlement, and Notice of Lodging in *Guzman* v. *Chertoff*, 2:08-cv-01327 GHK-SS (C.D. Cal. July 15, 2010) (settling for $350,000 FTCA claim of natural born and cognitively impaired U.S. citizen wrongfully deported to Mexico and lost there for three months). This protection can only be truly available where immigration officials do not have discretion to act in an unconstitutional manner.

Citizens and immigrants also have rights under the Fourth Amendment to be free from unlawful home raids by federal immigration officials. *I.N.S.* v. *Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984). Yet, in recent years, ICE investigations and enforcement have come to rely heavily on home raids. *See, e.g.*, Bess Chiu, et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, Cardozo Immigration Justice Clinic, at 5 (2009).[9] These raids have typically occurred at pre-dawn hours, without warrants, and often by forcible entry, with residents being seized without legal basis. *Id.* at 3. These home raids increase the likelihood that citizens and even citizen children will be unlawfully detained. *See, e.g.*, *Reyes* v. *Alcantar*, C07-2271 (SBA) (N.D. Cal.), Amended Complaint and Settlement Order

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[9] http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-report%20Updated.pdf.

(indicating FTCA and *Bivens* settlement for six-year-old U.S. citizen detained in a home raid); Stella Burch Elias, *'Good Reason to Believe': Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wis. L. Rev. 1109, 1129 (2008) (ICE home raids often result in arrests of "individuals categorized by ICE as 'collateral arrests'—individuals who happened to be present at the site of a[ICE] raid, and about whom, prior to their warrantless arrests, ICE typically held no information").[10]

ICE home raids are the contemporary equivalent to the no-knock home raids by federal drug agents that prompted Congress to amend the Act in 1974 to deprive the United States of immunity for the intentional torts of its law enforcement officers. *See* S. Rep. No. 93-588, *supra* at 2790. Fortunately, that amendment allows state tort law to provide redress to victims of such invasions—but only in jurisdictions in which federal law enforcement officials are not given discretion to violate the Constitution. *See Rodriguez* v. *United States*, 542 F.3d 704, 708 (9th Cir. 2008) (noting district court's FTCA judgment in favor of family whose home was unlawfully invaded by immigration officials); *Rhoden* v. *Dep't of Justice*, 121 F.3d 716, 716 (9th Cir. 1997) (unpublished disposition noting FTCA judgment for wrongfully detained lawful permanent resident).

The Act is similarly an important means of redress for immigration detainees who experience unlawful conditions of confinement. The right against

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[10] http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-lawsuits.

conditions of confinement that are so lacking that they constitute punishment is derived from the Fifth Amendment and is at least as extensive as rights protecting pre-trial detainees. *See Edwards* v. *Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (immigrant detainees are entitled to same level of constitutional protection as pre-trial detainees); *Jones* v. *Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (holding civil detainees entitled to greater constitutional protection than convicted prisoners and pre-trial detainees).

Hui v. *Castaneda*, 130 S. Ct 1845 (2010), illustrates the need for a robust Act to address unlawful detention conditions. For over ten months, Castaneda, while detained by ICE, sought treatment for a painful lesion on his penis. *Id.* at 1849. Although a biopsy was recommended several times to rule out cancer, federal officials denied the procedure as elective. *Id.* Instead he was treated with ibuprofen and antibiotics, and he was given extra boxer shorts. *Id.* After his release from custody, he promptly sought treatment, but because his cancer had metastasized, he died. *Id.* This Court held that Castaneda's *Bivens* claims were statutorily precluded and that the Act was his exclusive remedy. *Id.* at 1854.

Castaneda is not alone—stories of improper treatment in medical facilities abound. For instance, Boubacar Bah fell in a New Jersey immigration detention center injuring his head. Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. Times, May 5, 2008, at A1. Instead of providing prompt medical care, immigration officials shackled him, pinned him to the floor and left him in solitary confinement for thirteen hours. *Id.* He was finally

taken to a hospital where he received surgery for a skull fracture and brain hemorrhages that left him comatose for several months until he died. *Id.* Jason Ng, a detainee in Rhode Island complained for months about excessive pain. *Lin Li Qu* v. *Central Falls Detention Facility Corp.*, __ F. Supp. 2d __, No. 09-53 S, 2010 WL 2380739 at *1 (D.R.I. June 14, 2010). Medical and security staff accused him of faking illness and denied him treatment. *Id.* at *2. He was finally diagnosed with liver cancer and a broken spine, only a week before his death. *Id.* All too often, medical care provided to detainees has failed to pass constitutional muster, and a robust Act is a necessary deterrent. *See, e.g.*, *Lijadu* v. *I.N.S.*, No. 06-1508, 2009 WL 508040 (W.D. La. Feb. 26, 2009) (finding medical care unconstitutionally deficient where detainee waited eight weeks for treatment of his fractured arm, eight months for a refill for ulcerative colitis medication, sixteen months for clinical exams for his HIV and ulcerative colitis and fifteen months for repair of broken dentures).

Unconstitutional detention conditions are not limited to adult detainees. In 2007, DHS settled several cases brought by detained children ages 3-16 who were deprived of adequate medical, mental health and dental care, as well as educational opportunities. *See* Settlement Agreement, *In re Hutto Family Detention Center*, No. A-07-164-SS (W.D. Tex. Aug. 26, 2007).[11] The children were housed in highly restrictive settings and who were harshly disciplined by guards who threatened to permanently separate them from their parents. *Id.*, *see also* Nina Bernstein, *U.S. to Reform Policy on*

[11] http://www.utexas.edu/law/clinics/immigration/Hutto_settlement.pdf.

Detention for Immigrants, N.Y. Times, August 5, 2009, at A1.

In these cases, the Act serves dual roles. It compensates victims, and it provides a necessary deterrent against future malfeasance. In that respect, the Act "represents a landmark in governmental acceptance of responsibility and efforts to reduce injustice." William G. Weaver & Thomas Longoria, *Bureaucracy that Kills: Federal Sovereign Immunity and the Discretionary Function Exception*, 96 Am. Pol. Sci. Rev. 335, 337 (2002).

In its deterrent role, the Act provides a valuable incentive to agencies to develop strong policies that promote accountability and professional treatment of citizens. *See* Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 U.C.L.A. L. Rev. 871, 886 (1991). Tort laws are premised in part on the fact that potential liability will affect the behavior of potential tortfeasors. Restatement (Second) of Torts § 901 cmt. C (1979) ("unlike the law of contracts or of restitution, the law of tort * * * has within it elements of punishment or deterrence"). The risk of liability provides an incentive to avoid tortious behavior. *See Dobson* v. *Camden*, 705 F.2d 759, 770 (5th Cir. 1983) ("[D]eterrence is concerned with establishing a rule to shape future conduct. A potential tortfeasor's actions will probably not be shaped by considerations of whether the injured party will be compensated nearly as much as they will be shaped by considerations of whether the tortfeasor will have to pay").

The Fifth Circuit's decision here undermines the Act's deterrent function by allowing liability only when the government has mandated a specific course

of conduct and the agent has violated it. Pet. App. 3a, 67a (upholding district court reasoning that the first prong of the discretionary function exception is not satisfied only if a "statute, regulation or policy mandates a specific course of action"). Under that view of the Act, the Fifth and Seventh Circuits have created a disincentive for local bureaus to lay out specific procedures because that would inherently subject an agency to greater liability. And the likely outcome is that there will be a host of Fifth and Seventh Circuit Border Patrol agents, Customs officials, and other law enforcement officers with less local guidance than agents in other regions.

But the indifference that Border Patrol displayed in this case needs an adequate deterrent. And local supervisors need an incentive to develop reasonable policies tailored to the local area that will aid in fair law enforcement.

B. A Clear Scope For The FTCA Is Valuable Beyond The Immigration Context.

A large number of claims under the Act relate to immigration and detention issues, but claims filed under the Act span an array of subject matters. And all of the deterrent and compensation concerns that make a robust and uniform Act important in the immigration realm also apply along the gamut of issues arising under the Act. The Act is designed to protect rights, property and safety against tortious action by government agents. *Mass. Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 139 (1956) ("[t]he central purpose of the original Act was to allow recovery against the United States on the basis and to the extent of recoveries for like torts committed by private tortfeasors"). The Fifth and Seventh Circuits' interpretations of the discretionary function

exception, however, have rendered the Act toothless in cases where agencies do not self-regulate and the courts thereby have diminished agencies incentive to do so.

When properly applied by the courts, the Act provides a remedy for a broad range of tortious injuries to individuals, businesses, and other organizations. In the business context, the Act can provide recourse for businesses injured by government action ranging from negligent failure to inspect grain warehouses, *Appley Bros.* v. *United States*, 164 F.3d 1164, 1175 (8th Cir. 1999), to malicious prosecution arising out of a dispute over importation of medical supplies, *Tri-State Hosp. Supply Corp* v. *United States*, 142 F. Supp. 2d 93, 101 (D.D.C. 2001).

For instance, in *Jerome Stevens Pharmaceuticals, Inc.* v. *FDA*, 402 F.3d 1249, 1250 (D.C. Cir. 2005), the FDA posted trade secrets and other confidential information regarding a new drug on its website. The drugmaker sued the FDA under the Act for misappropriation of trade secrets and breach of a confidential relationship. *Id.* The district court dismissed the claims under the discretionary function exception. *Id.* at 1252. But the D.C. Circuit reversed, noting that the discretionary function exception did not apply to claims arising out of the disclosure of JSP's trade secrets by the FDA because federal laws prohibit it. *Id.* at 1252, 1258.

The Act further provides protection for a broad array of individual issues that do not relate to immigration or detention. For instance, In *Melton* v. *United States*, 488 F. Supp. 1066, 1068-70 (D.D.C. 1980), the government had undertaken to rehabilitate an individual's property but had

negligently hired contractors and supervised workers who left the rehabilitation incomplete and left the property abandoned and vandalized. The property owner won restoration damages for her property loss under the Act because the government had undertaken a duty to restore the property, and then its negligence caused the damage. *Id.* at 1075. *See also Oberson* v. *U.S. Dept. of Agric.*, 514 F.3d 989 (9th Cir. 2008) (government liability where the U.S. Forest Service posted speed limits along a trail, thereby creating a duty of care toward travelers, but failed to adequately warn of the danger of a steep drop on the trail), *Blessing* v. *United States*, 447 F. Supp. 1160, 1200 (E.D. Pa. 1978) (denying motion to dismiss claims under the Act brought by workers who suffered injuries caused by negligent safety inspections by the government).

Additionally, the Act provides protection against government abuses arising out of citizens' exercise of constitutional rights. Indeed, actions by government officials related to people's exercise of First Amendment rights often result in false arrest, malicious prosecution, or other claims that may not be actionable under the Fifth Circuit's overbroad view of the discretionary function exception. See, e.g., *Galvin* v. *Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (refusing to apply discretionary function exception to false arrest claim based on unconstitutional dispersal of prayer service), *Bergman* v. *United States*, 844 F.2d 353, 354 (6th Cir. 1988) (noting successful FTCA claim when FBI failed to take steps to protect civil rights protesters).

As a statute that spans all of tort law, the Act provides important protections over a broad array of potential claims. For 57 million people in the Fifth

and Seventh Circuits, along with myriad businesses and organizations that reside or do business there as well, the Act does not provide compensation when an agency acts unconstitutionally or outside of its authority. Moreover, the Fifth and Seventh Circuits' interpretation deters agencies from setting rules, rather than deterring agents from breaking them. The time has come to provide uniform application of the Act throughout the country, and allow people in the Fifth and Seventh Circuits to enjoy the fair application of the Act that Congress intended.

CONCLUSION

For these reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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